

# Table of Contents

<b>I. Introduction.....</b>	<b>3</b>
<b>II. Background on Executive Privilege.....</b>	<b>4</b>
Arguments Against Executive Privilege.....	4
Arguments in Favor of Executive Privilege.....	5
Impeachment.....	7
Freedom of Information Act (FOIA).....	7
<b>III. Literature Review.....</b>	<b>8</b>
Presidential Success.....	8
Executive Privilege.....	10
<b>IV. Theory and Hypotheses.....</b>	<b>12</b>
<b>V. Methodology.....</b>	<b>15</b>
Case Selection.....	15
Dependent Variable.....	16
Independent Variables.....	17
<b>VI. Data and Analysis.....</b>	<b>19</b>
<b>VII. Conclusion.....</b>	<b>26</b>
<b>Appendix A: Table of Variables 1-3.....</b>	<b>28</b>
<b>Appendix B: Table of Variables 4-5.....</b>	<b>32</b>
<b>References.....</b>	<b>34</b>

## I. Introduction

Though executive privilege is not explicitly mentioned in the U.S. Constitution, presidents beginning with George Washington have asserted the right to withhold information from Congress and to prevent executive branch officials from testifying before congressional committees. While the privilege can be invoked against “those who have compulsory power”<sup>1</sup> generally, in the majority of cases presidents use it in response to congressional inquiries. The two bases commonly cited for executive privilege are the presidential communications privilege, which derives from the separation of powers doctrine and protects deliberations between the president and other executive branch officials and those among presidential advisers, and the deliberative process privilege, which derives from common law and applies to any member of the executive branch.

For a long time, Congress was hesitant to seek a court ruling on executive privilege, and it was not until *United States v. Nixon* (1974) that the Supreme Court addressed the issue. The Court recognized the constitutional validity of executive privilege but emphasized that it was a qualified privilege that had to be balanced with the Congressional power of conducting investigations. The Court ultimately rejected Nixon’s claim to it in that case. Although the Court’s recognition of executive privilege as valid gave it increased legitimacy, its attempted use in two presidential scandals—the Watergate scandal and the Lewinsky scandal—has made modern presidents hesitant to formally invoke it. Nevertheless, every president since Nixon has sought to use the privilege at least once.

---

<sup>1</sup> “Trump and the Parameters of Executive Privilege,” NPR, <https://www.npr.org/2018/03/03/590616771/trump-and-the-parameters-of-executive-privilege> (accessed April 3, 2018).

Because executive privilege is not outlined in the Constitution and there are no clear-cut rules that govern its use, claims of executive privilege often result in a clash between legislative and executive interests. Presidents frequently receive pushback when they invoke executive privilege—but not always. Some cases of executive privilege go to court; some are resolved by compromise, and some are not challenged at all. Sometimes the president succeeds in keeping the information from Congress, and sometimes he does not. What makes the difference? Can we capture it with the same explanations of presidential success as those established for legislative endeavors, or are other factors at play here? This project applies standards of presidential success in legislation to presidential use of executive privilege, in addition to examining several factors unique to cases of the privilege, and aims to explain why some attempted uses of executive privilege are successful whereas others are not.

## **II. Background on Executive Privilege**

### **Arguments Against Executive Privilege**

The foremost complaint lodged against executive privilege is that it is not explicitly outlined in the Constitution. This leads critics who use a strict interpretation of the Constitution, such as Raoul Berger, to believe that the constitutional basis for executive privilege is a “myth.” However, most scholars reject this reasoning; Rozell (2010, 9) argues that both presidents and Congress have always exercised powers that are not explicitly provided for in the Constitution, and that in order for this critique to be legitimate, critics must demonstrate that the Framers clearly intended that the power not be exercised and created impediments to its use.

Another common argument against the use of executive privilege is that it is not compatible with the democratic ideal of open government. Critics argue that our democracy

cannot function properly unless Congress and the public have access to information about the executive branch's actions. According to Miroff (1989, 157), "Secret action . . . permits a president to persist in a course of policy even if that policy lacks support from, or is strongly opposed by, majorities in Congress and among the American people. . . ." Other evidence cited by critics that executive privilege is against the principles of our democracy is that it is incompatible with the First Amendment right to freedom of the press and that it conflicts with the Freedom of Information Act (see Freedom of Information Act section below). Wise (1973, 149-50) believes that the right to free press cannot be qualified, even in the case of national security concerns, because "a democratic system requires a public informed about the decisions and actions of its political leaders."

Lastly, critics of executive privilege argue that it is commonly used to cover up wrongdoing. Indeed, executive privilege has been involved in the cover-up of several scandals; President Nixon attempted to invoke it to conceal his wrongdoing during the Watergate scandal, and President Clinton tried to use it to hide his misdeeds in the Lewinsky scandal. Some critics argue that the evil that results from the misuse of the privilege is worse than any potential evil from releasing sensitive information, and therefore it ought not to be used (Rozell 2010, 18). Berger (1974, 26-27) articulates this argument: "Against the debatable assumption that fear of disclosure to Congress may inhibit 'candid interchange' there is the proven fact that such exchanges have time and time again served as vehicles of corruption and malversation."

### **Arguments in Favor of Executive Privilege**

The primary argument in favor of executive privilege is that it is a power necessary for the executive branch to do its job effectively and for the president to receive candid advice from

his advisers. William Rehnquist once said, “While reasonable men may dispute the propriety of particular invocations of executive privilege . . . I think most would agree that the doctrine itself is an absolutely essential condition for the faithful discharge by the executive of his constitutional duties” (U.S. Congress 1971, 424). In fact, according to Rozell, executive privilege is an even more vital tool today than it was when the Framers wrote the Constitution. He says that “the importance of secrecy, unity, and dispatch to governing . . . is even more compelling than it was over two centuries ago. Many, if not most, of the crises faced by modern governments cannot be dealt with through open, lengthy national deliberations” (2010, 44-45). He argues that the Framers recognized that the president is more suited to respond to crisis situations than Congress because he is only one person, and thus there are institutional capabilities attached to the presidency that allow him to do so. The courts “have recognized the executive’s preeminence in national security and foreign policy making on a number of occasions,” (Rozell 2010, 45), which gives legitimacy to executive privilege at least insofar as it is necessary to preserve national security.

Another case made for executive privilege is that it provides a check on Congress’s power of inquiry. The power of inquiry is not outlined in the Constitution, but Albert (1974, 1361) says that the references to impeachment in the Constitution imply a legislative power of inquiry into wrongdoing. While some argue that Congress should have absolute power of inquiry, according to proponents of executive privilege such as Rozell (2010, 50), this view is wrong. He says that “there are inherent institutional limits on the powers of the respective government branches” (2010, 50). Rozell (2010, 50) also points out that “it is ironic that Berger maintains that executive privilege lacks validity because it is not specifically granted by the

Constitution and then argues that Congress possesses an absolute, unlimited inquiry power despite a similar lack of such a constitutional grant.”

## **Impeachment**

According to Cox (1974, 1435), “History gives no affirmative support to presidential claims of privilege to withhold information from the House of Representatives while it is considering impeachment.” Whereas neither the legislative power of inquiry nor the right of the executive to withhold information appears in the Constitution, the right of Congress to impeach is outlined in Article II, Section 4. According to a House report, “The House has the sole right of impeachment . . . a power which implies the right of inquiry on the part of the House to the fullest and most unlimited extent” (U.S. Congress 1843). Additionally, the Supreme Court ruled in *United States v. Nixon* (1974) that “the impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.”

## **Freedom of Information Act (FOIA)**

Although FOIA provides for transparency in government, Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” (FOIA 2006). The D.C. Circuit Court of Appeals has ruled that this “incorporates all civil discovery rules into FOIA” (*Martin v. Office of Special Counsel* 1987). Executive privilege is one of the “primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5” (United States Department of Justice 2014, 359; hereafter USDOJ). Additionally, the Supreme Court has ruled that in order

for a document to be released under FOIA, it would have to be a document that would be routinely released in civil litigation (USDOJ 2014, 358). Thus, the privilege is absolute in FOIA cases and cannot be overcome by a showing of need.

### **III. Literature Review**

#### **Presidential Success**

There is an abundance of literature on presidential success in legislation that will inform the research in this study. When analyzing presidential success, researchers often aim to explain whether success is more affected by presidency-centered or Congress-centered (also referred to as contextually-oriented) variables. In other words, can presidents affect their own success, or does it depend solely on institutional factors?

In the 1990s the general consensus among researchers was that presidential skills “did not play very much into the equation” of presidential success in legislation (Catt 2013, 2). Edwards (1989) uses box scores to measure congressional support for presidents’ policies from 1953 to 1986. He concludes that the majority of policy outcomes can be explained by party and ideology in Congress and that presidential skills have only a marginal effect. Bond and Fleisher (1990) use the “Congress-centered model” to explain presidential success in legislation and achieve similar results. They find that the party and ideological makeup of Congress consistently affects presidential success, whereas presidential legislative skills do not have a significant effect. They use these results to posit that presidential success is primarily a function of congressional environment and that there is little that individual presidents can do to affect their rates of success. However, they note that they “would like to have a more precise and reliable measure of presidential leadership skill” (1990, 218).

Since then, some scholars have shown that presidents can significantly contribute to their success. Beckmann (2010, 142) finds that a president can increase his success rate by 34 percentage points by lobbying for his policy positions. Rudalevige (2002, 149) finds that presidents can increase their chances of achieving their objectives by 14 percent by developing policy in a decentralized manner. Covington, Wrighton, and Kinney (2002) develop a more precise measure of presidential skill in their “presidency-augmented model” to explain presidential success in roll call voting. They expand on the Congress-centered model and make two modifications: (1) when examining roll call votes, they measure whether the bill was supported by the president, and (2) they designate congressional leaders as “mediators between Congress and the president who provide presidents an indirect means of affecting voting outcomes” (2002, 1003). With this broader definition of presidential influence, they find that presidents’ skills affect their success in roll call voting. However, the study also confirms the finding from Edwards (1989) and Bond and Fleisher (1990) that party and ideological differences in Congress strongly affect presidential success.

Numerous studies have shown that the presence of the president’s party in Congress has an effect on presidential success. This holds true regardless of how success is measured or how the party is operationalized (Catt 2013, 36). Studies have used diverse methods of operationalizing the party variable, such as the percentage of Congress that is of the same party as the president (Barrett and Esbaugh-Soha 2007; Canes-Wrone and De Marchi 2002; Rudalevige 2002), divided government (Edwards, Barrett, and Peake 1997; McCarty 1997), and unified government (Canes-Wrone 2001; Ostrom and Simon 1985).

Several studies have analyzed the effect of timing on presidential success. A few studies found that presidents are more successful during the honeymoon period, which is typically



defined as the first 12 months in office. Eshbaugh-Soha (2010, 718 & 720) finds that the honeymoon effect increases a president's chance of legislative success by 9 percent overall, with a 15 percent boost for major laws and no change for minor laws. Lockerbie, Borrelli, and Hedger (1998, 167) conclude that the president is 9.5 percent more likely to succeed during his first year. However, a few studies that define the honeymoon period as the first two years of a president's term (Beckmann 2010; Edwards, Barrett, and Peake 1997) find that the honeymoon period has no effect on the success of legislation. No studies have shown that it has a negative impact on success (Catt 2013, 45). Two studies (Barrett and Esbaugh-Soha 2007; Beckmann 2010) have also examined the effect of the lame duck period, which was defined as the president's last two years in office. However, neither has found that it had a significant effect.

Some studies (Ostrom and Simon 1985; Rivers and Rose 1985) have found that the greater the size of a president's agenda, the less likely he is to be successful. However, the effect is relatively small. Ostrom and Simon (1985) find that for every 100 additional items on the president's agenda, his chances of success decrease by 1.8 percentage points.

The body of literature on presidential success in legislation will contribute to this study by providing a framework for analyzing presidential success in the area of executive privilege. One presidency-centered variable—previous uses of executive privilege—will be considered, in addition to several contextually-oriented variables—party, honeymoon period, and the existence of a national security threat.

### **Executive Privilege**

The existing literature on executive privilege is primarily concerned with evaluating its legitimacy. Berger (1965) steadfastly holds that there is no valid justification for the privilege. He analyzes the history of the United States government and the British Parliament, as well as

the ideas of influential thinkers such as Baron de Montesquieu. He asserts that the U.S. system of government as outlined in the Constitution was modeled after Parliament, and therefore Congress is the “grand inquest” of the nation (1965, 1058-1060). In his view, Congress’s right to information is absolute. Berger (1965, 1060) determines from studying Montesquieu that “history delineates a virtually unlimited legislative power to demand information from the executive branch.” From his strict reading of the Constitution, he concludes that executive privilege has no constitutional basis because it is not what the Framers intended.

Mark Rozell (2010) argues in favor of executive privilege. He provides an expansive overview of the history of its use and refutes many of Berger’s arguments, calling his strict interpretation of the Constitution “not credible” (2010, 25). He points out that Article III contains many general descriptions of power, and presidents have historically exercised a number of powers that are not enumerated in the Constitution (2010, 25). Rozell (2010, 1) proposes that “the resolution to the dilemma of executive branch secrecy and democratic accountability is in the founders’ theory of the separation of powers. That theory allows for a carefully exercised and properly constrained presidential power of executive privilege.”

Although this study will not make any conclusions about whether executive privilege is legitimate, the literature on executive privilege contributed to my understanding of the controversy around the privilege, and it led to the inclusion of several other variables that are not found in studies of presidential success in legislation.

The literature on executive privilege points to the idea that presidents will be more successful when a claim of executive privilege involves a threat to national security. Rozell (2010, 4) says that “the presumption in favor of executive privilege has always been strongest in areas of national security and foreign policy.” The courts have “generally provided broad

discretionary authority to the president in national security and foreign affairs” (Rozell 2010, 46), and in *United States v. Nixon* (1974), the Supreme Court acknowledged the president’s “need to protect military, diplomatic, or sensitive national security secrets,” which comes from Article II of the Constitution.

The literature also suggests that contempt of Congress proceedings affect executive privilege outcomes. According to Rozell (2010, 200), “presidential history is replete with examples of chief executives who tried to invoke privilege or threatened to do so, only to back down in the face of congressional challenges.” Chafetz (2011, 1084) says that “the legislative contempt power has played . . . a key role in resolving contested questions of the allocation of power within the federal government.”

While the bodies of literature for both executive privilege and presidential legislative success are expansive, there have not been any studies that have merged the two. In doing that, this study will provide a better understanding of presidential success in areas other than legislation as well as provide a more quantitative approach to the questions examined in the literature on executive privilege.

## **IV. Theory and Hypotheses**

The question of whether presidents can affect their own success is interesting in its own right, and it is particularly worth examining as it relates to executive privilege. Executive privilege cases are similar to legislation in that they both involve relations between the president and Congress, but it is unlikely that presidential success in executive privilege will be completely captured by the determinants of success in legislation. Whereas legislation is contentious because of differing ideological beliefs about the content of the laws, executive privilege is controversial

in itself. It is widely used, and the Supreme Court has recognized its validity, yet many still hold that it should not exist. The determinants of success in executive privilege cases can tell us more about what determines success under a different set of conditions; whereas the president's role in enacting legislation is indisputable, his right to use executive privilege is much less certain.

Moreover, examining the determinants of success in executive privilege can contribute to our knowledge of how the balance of powers plays out in our democracy and to test whether it is functioning as the Framers intended. Additionally, knowledge of the variables that contribute to presidential success in executive privilege will allow us to hold current presidents and members of Congress more accountable for their roles in executive privilege. This is because once we know the determinants of success, we will know whether success is more dependent on legitimate democratic principles such as balance of powers and constitutionally-granted abilities or whether one side has much more power than the other in affecting the outcomes.

The president's party in relation to the party composition of Congress has been widely documented as having an affect on presidential legislative success. I predict that party will also have an effect in cases of executive privilege. *I hypothesize that presidents will be more successful when there is a higher percentage of Congress of the same political party and less successful when there is a lower percentage of the same political party.* This is because members of the same party would likely want the president to succeed and would therefore opt to take no action or a less harsh action in response to the use of executive privilege. Furthermore, party could play a role when there is a vote on whether to hold an official in contempt of Congress. Independently of whether Congress threatens to do this, party could affect whether or not the president chooses to back down on his claim. If a higher percentage of Congress is of the same party, the president will be less concerned about the possibility of an executive branch official

being held in contempt of Congress and will therefore be less likely to back down and more likely to succeed.

Eshbaugh-Soha's (2010) finding that honeymoon periods have a bigger effect on presidential success for major laws suggests that honeymoon periods would have an effect in cases of executive privilege because they tend to be high-profile and concern important information, which makes them more similar to major laws than minor ones. I predict that the honeymoon will affect a president's chances of success in cases of executive privilege. I theorize that Congress will be more supportive of the president during his first year and that fresh-faced presidents will be seen as more trustworthy than presidents who are later in their tenure, and thus Congress will be more likely allow their claims of executive privilege to stand. Therefore, *I hypothesize that presidential claims of executive privilege will be more successful during the honeymoon period.*

I predict that the number of times a president has previously used executive privilege will have an effect on his likelihood of success. There is some similar evidence in the literature on presidential success; Rivers and Rose (1985) find that the greater the size of a president's agenda, the less likely he is to be successful. I predict that the number of executive privilege claims during a presidency will follow a similar pattern. Additionally, people tend to be skeptical of the use of executive privilege, and it is likely that if a president uses it too many times, people will find it suspicious. Therefore, *I hypothesize that the greater the number of times a president has previously invoked executive privilege, the less likely he is to be successful.*

I theorize that whether or not a claim of executive privilege involves national security interests will strongly affect success. This is because people—both members of government and the public—seem more willing to accept a lack of transparency in government when they feel

that national security is at stake. Additionally, the courts have acknowledged that presidents ought to have more authority when it comes to national security and foreign policy. In *Zemel v. Rusk* (1965) the Supreme Court ruled that “Congress—in giving the president authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic affairs” (*Zemel v. Rusk*, 1965). In addition, the Supreme Court has recognized national security as a compelling reason for invoking the privilege, giving added legitimacy to those claims. In *United States v. Reynolds* (1953, 418), the Court held that “it may be possible to satisfy the court . . . that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate. . . .” *I hypothesize that cases of executive privilege that involve national security will be more successful than cases that do not.*

The literature on executive privilege points to the idea that presidents often back down when faced with pushback from Congress, and a primary way that Congress pushes back is by pursuing contempt of Congress citations against executive branch officials. I predict that presidents will want to avoid a drawn-out dispute with Congress wherever possible because it would likely cause the public to have more negative views of the president and because it would make it more difficult for the president to accomplish his legislative goals. *Therefore, I hypothesize that presidents will be less successful in cases in which Congress pursues a contempt citation than those in which Congress does not pursue a citation.*

## **V. Methodology**

### **Case Selection**

There is no consensus on what constitutes a presidential claim of executive privilege. While most cases are clear-cut, there is disagreement over whether some cases constitute formal claims of executive privilege. For example, the issue of executive privilege was raised but the privilege was not formally invoked by President Clinton during the Senate Whitewater investigation in 1995. Therefore, different sources define executive privilege claims differently. The cases used in this research were selected from a Congressional Research Service report for Congress, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments* (Garvey 2014). The only claims outlined in this report that were omitted from this research are the ones in which a member of the executive branch acted without direction from the president. The report lists cases only from the Kennedy administration through the Obama administration. This will make for more accurate and interesting results than examining all claims since 1789 because there is little information available about executive privilege claims prior to the ones used in this study.

### **Dependent Variable**

There are varying definitions of presidential success in legislation in the literature. Some, such as the presidential box score, measure only the percentage of legislative proposals in a year that are approved by Congress. Others, such as support scores and NOMINATE scores, take into account support for a president's initiatives and presidential influence. For the purposes of this study, success will be defined more similarly to the presidential box score; it will concern only concrete success, not softer forms such as presidential influence. Success in executive privilege will be defined in terms of the amount of information in a given executive privilege claim that was not released to Congress or the public. Outcomes will be divided into three categories: successful, somewhat successful, and unsuccessful. Successful cases will be defined as those in

which the president was able to prevent the release of all of the information in question.

Somewhat successful cases will be those in which the president was able to keep some but not all of the information private. Unsuccessful cases will be those in which all of the information in question was released.

Information on the outcome of each case was first obtained from *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments* (Garvey 2014). However, this report offered only brief summaries of the claims, and for most cases, it did not give the outcome. For those cases, the information was found in *Executive Privilege: Power, Secrecy, and Accountability* (Rozell 2010). However, because this book was published in 2010, information about the outcome of President Obama's use of executive privilege was not available; this was found in the newspaper article "Obama Relents in Fight Over Fast and Furious Documents."<sup>2</sup>

### **Independent Variables**

Party Composition of Congress. Party will be operationalized as the percentage of the relevant chamber of Congress that was of the same political party as the president. The variable will be discrete instead of continuous; it will be divided into two categories, Majority and Minority. This is because studies have found that the party controlling Congress has power regardless of the size of their control (Cox and McCubbins 2005). For cases in which the numbers changed between the time the case was invoked from the time it was decided, the numbers from the invocation date were used. This is to maintain consistency because the decision date was not available or

---

<sup>2</sup> Josh Gerstein, "Obama Relents in Fight Over Fast and Furious Documents," *Politico*, 8 April, 2016.



applicable for all cases. This data was retrieved from House.gov (House.gov 2017) and Senate.gov (Senate.gov 2017).

Honeymoon Period. Studies have differed on how to handle issues with honeymoon periods, such as second terms and presidents who come into office without being elected. Some (Lockerbie, Borrelli, and Hedger 1998; Esbaugh-Soha 2006) define the honeymoon period as a president's first year in office. However, others (Beckmann 2010; Edwards, Barrett, and Peake 1997; Esbaugh-Soha 2010) find that honeymoon periods are associated with elections. For this study, the honeymoon period will be defined as the first year in office after winning an election. Therefore, presidents who serve two terms will have two honeymoon periods, and President Ford will not have a honeymoon period because he assumed office without being elected.

Previous Uses of Executive Privilege. The number of previous uses of executive privilege for each president was found in *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments* (Garvey 2014). The variable was then divided into three categories: 0 previous uses, 1-3 previous uses, and 4 or more previous uses.

National Security. As noted by Rozell (2010, 47), "merely uttering the words *national security* does not in itself justify a claim of executive privilege. The threat to national security must be real." Thus, the president's word alone cannot determine whether a case involves national security. For the purposes of this study, whether or not national security is at play will be determined by the stated purpose for using executive privilege by the president or another member of the executive branch if it is allowed to stand, or by a court's findings if it determines the claim of national security to be not credible. This information was found in *Executive*

*Privilege: Presidential Power, Secrecy, and Accountability* and from court cases, where applicable.

Contempt of Congress. The information on whether or not Congress pursued a contempt citation was found in *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments* (Garvey 2014) and in *Executive Privilege: Presidential Power, Secrecy, and Accountability* (Rozell 2010). Cases that went to court were excluded from this variable because it is assumed that the court proceedings replaced the need for Congress to seek a contempt citation. Cases in which Congress only threatened to pursue a contempt citation were treated the same as cases in which they followed through because according to Rozell (2010, 200), it is not only the exercise of congressional powers that matters, “but the threat that Congress may resort to such measures.”

## **VI. Data and Analysis**

In order to examine the effects of party in Congress on presidential success in executive privilege, I cross-tabulated the two variables. The null hypothesis is that the presence of a president’s party in Congress has no effect on his success in executive privilege cases. I used Fisher’s exact test to determine the statistical significance of the relationship because the cell sizes were too small for a chi-squared test.

Successful	President's Party in Congress		Total
	Majority	Minority	
No	3 50.00	10 41.67	13 43.33
Somewhat	1 16.67	6 25.00	7 23.33
Yes	2 33.33	8 33.33	10 33.33
Total	6 100.00	24 100.00	30 100.00
Fisher's exact =			1.000

*Table 1: Cross-tabulation on presidential success by party in Congress*

The result,  $p = 1.000$ , revealed that there is no relationship between the two variables; therefore, we cannot reject the null hypothesis. There are several factors that might explain why party did not have the expected effect. First, it might be that ideology about the use of executive privilege—rather than party—determines a congressperson's attitude toward a particular claim of executive privilege. Congress typically seems to be unified in its request for information in order to perform an investigation; it seems that the more likely split than Democrat versus Republican is legislative branch versus executive branch. Additionally, because a lack of presidential success in executive privilege will not have the same substantive policy results that a lack of success in legislation will, it seems probable that members of Congress will not be as likely to vote along

party lines. Although they might have some inclination to do this because of loyalty to their party, they might be more concerned with making their own branch of government seem more successful.

To test whether or not the honeymoon period has an effect on success, I cross-tabulated the honeymoon variable with presidential success. The null hypothesis is that whether or not the president is during the honeymoon phase of his presidency will have no effect on the outcomes of his success in executive privilege claims. I used Fisher's exact test for this tabulation also because of the small sizes in some cells.

Successful	Honeymoon		Total
	No	Yes	
No	7 30.43	6 85.71	13 43.33
Somewhat	6 26.09	1 14.29	7 23.33
Yes	10 43.48	0 0.00	10 33.33
Total	23 100.00%	7 100.00%	30 100.00%
Fisher's exact =			0.025

*Table 2: Cross-tabulation on presidential success by honeymoon period*

The result for this tabulation,  $p = 0.025$ , revealed that the relationship between the honeymoon period and presidential success in executive privilege is statistically significant at the conventional level of  $p \leq 0.05$ . This indicates that we can reject the null hypothesis. However,

the relationship appears to go in the opposite direction than hypothesized—the results indicate that presidents are *less* likely to be successful during the honeymoon period, not more likely.

Perhaps this a result of the skills presidents develop during their tenure. More experienced presidents might be able to predict more correctly when their use of executive privilege will lead to the outcome they want and when they should give in to Congress's demands.

However, we should be cautious about these results because it appears as though the contempt of Congress variable is interfering with the outcome. Table 3 shows the seven cases in which presidents were in the honeymoon period when they invoked executive privilege.

Case	Honeymoon	Percent Congress	Previous Uses	National Security	Contempt of Congress	Successful
Nixon (1973) [Watergate 1]	Yes	42% (Senate)	3	No	Court	No
Nixon (1973) [Watergate 2]	Yes	N/A (Special Prosecutor Archibald Cox)	4	No	Court	No
Reagan (1981)	Yes	44.14% (House)	0	Yes	Yes	No
Clinton (May 1997)	Yes	47.59% (House)	5	No	Yes	No
Clinton (Oct. 1997)	Yes	47.59% (House)	6	No	No	No
Bush (2001)	Yes	50.57% (House)	0	No	No	Somewhat
Obama (2012)	Yes	44.37% (House)	0	No	Yes	No

*Table 3: Executive privilege claims made during a president's honeymoon period*

We should take note that of the seven cases that involved a honeymoon period, two involved a Supreme Court case and three involved contempt of Congress citations. It seems as though we cannot draw a conclusion with such a small sample size because of the overlap with the contempt variable.

In order to test whether the number of times a president has previously used executive privilege has an effect on his success, I cross-tabulated these two variables. The null hypothesis is that the number of previous uses has no effect on presidential success in executive privilege claims. Again, Fisher's exact test was used because of the small sizes in some cells.

<b>Successful</b>	<b>Previous Uses</b>			<b>Total</b>
	<b>0</b>	<b>1-3</b>	<b>4+</b>	
<b>No</b>	4	5	4	13
	44.44	41.67	44.44	43.33
<b>Somewhat</b>	2	4	1	7
	22.22	33.33	11.11	23.33
<b>Yes</b>	3	3	4	10
	33.33	25.00	44.44	33.33
<b>Total</b>	9	12	9	30
	100.00%	100.00%	100.00%	100.00%
Fisher's exact =				0.843

*Table 4: Cross-tabulation on presidential success by previous uses of executive privilege*

Fisher's exact test revealed that there is no statistically significant relationship, with  $p = 0.843$ ; therefore, we cannot reject the null hypothesis. While I hypothesized that presidents would be less likely to succeed when they had a higher number of previous uses of executive privilege because they would be seen as less trustworthy, it seems as though members of Congress evaluate the worthiness of a particular claim of executive privilege independently of any previous claims.

To test whether or not presidents are more successful in cases that involve a threat to national security, I cross-tabulated these two variables and used Fisher's exact test to determine whether or not the result is statistically significant.

Successful	National Security		Total
	No	Yes	
No	12 52.17	1 14.29	13 43.33
Somewhat	6 26.09	1 14.29	7 23.33
Yes	5 21.74	5 71.43	10 33.33
Total	23 100.00%	7 100.00%	30 100.00%
Fisher's exact =			0.064

Table 5: Cross-tabulation on presidential success by national security

The result,  $p = 0.064$ , revealed that the relationship is only marginally significant; it does not meet the conventional threshold for statistical significance. However, I think that if this test were to be repeated with a larger sample size, the results are likely to be statistically significant. There do not seem to be any significant interfering variables with this result; of the seven cases that involved national security, three involved contempt of Congress citations: Ford (1975), Reagan (1981), and G. W. Bush (July 10, 2008). Of those three, one was successful (Bush, July 10, 2008), and one was somewhat successful (Ford 1975).

Lastly, I tabulated the success variable with the contempt of Congress variable. The null hypothesis is that whether or not Congress pursues a contempt citation will have no effect on whether or not the president is successful.

Successful	Contempt of Congress		Total
	No	Yes	
No	2 14.29	6 60.00	8 33.33
Somewhat	3 21.43	3 30.00	6 25.00
Yes	9 64.29	1 10.00	10 41.67
Total	14 100.00%	10 100.00%	24 100.00%
Fisher's exact =			0.015

*Table 6: Cross-tabulation on presidential success by contempt of Congress*



The p-value of 0.015 reveals that the relationship is of conventional statistical significance and that we can reject the null hypothesis and accept the alternate hypothesis that whether or not Congress pursues a contempt citation has an effect on presidential success in executive privilege cases. There do not seem to be any interfering variables in this result; because the cases are divided pretty evenly between those that did and those that did not involve contempt citations, each category has a fairly even dispersal of the other significant variables.

## **VII. Conclusion**

These findings suggest that the outcome of an executive privilege case depends on a range of factors that differ somewhat from the determinants of success in legislation. For instance, they indicate that a variable that consistently affects legislative success, party composition of Congress, does not affect executive privilege cases in the same way. On the other hand, honeymoon periods, which some studies have found to affect legislative success, were found to have a significant relationship with executive privilege success, although it was in the opposite direction than hypothesized. Whereas no studies have found that the honeymoon period negatively affects presidential success in legislation (Catt 2013, 45), the results from this study indicate that it may have a negative effect in executive privilege cases.

Another variable that was found to be significant—whether or not Congress pursued a contempt citation—suggests that executive privilege outcomes are affected by the constitutional powers that the legislative branch is able to wield over the executive. Because claims of executive privilege involve a balancing act between the powers of the president and those of Congress, it seems as though the determinants of executive privilege are those factors that give either the legislative or the executive branch an edge over the other. Whereas in legislation it can

be assumed that the president has some common goals with members of Congress who are in his party, party alignments do not seem to matter much when it comes to executive privilege. Instead, it seems as though the result depends more on tenure (as captured by the honeymoon period), whether or not Congress wants to invoke its ability to cite officials for contempt, and, to a lesser degree, whether or not the case involves national security.

One limitation of this study is its small sample size. Although there have been many more uses of executive privilege than the 30 used in this study, information about the earlier claims is much more difficult to find. Future studies would benefit from the addition of more well-documented cases. This would likely make the results for the national security variable more accurate, as it is probable that it has a significant effect overall, even if did not quite meet standards of significance in the study of these 30 cases.

Future studies would also benefit from having a variable that measures the significance of each claim to each branch or perhaps including a measure of how it is seen in the public eye. This seems as though it would explain why sometimes one side simply gives up and allows the other to prevail; presumably, this would only occur if the stakes of the case are not very high. Lastly, future studies could look at the difference in outcomes when deliberative process privilege is invoked instead of presidential communications privilege. This seems as though it would be an important indicator; however, it is difficult to identify a stated reason in every claim that was used in this study. Perhaps if there is more media coverage and better documentation of future claims of executive privilege, this will be easier to accomplish.

### Appendix A: Table of Variables 1-3

Case	Congress	Honeymoon	Previous Uses	Successful?
Kennedy (1962) [Cold War education]	64% (Senate)	No	0	<b>Yes:</b> “The chairman of the subcommittee acquiesced to the assertion” (Garvey 2014, 24).
Kennedy (1962) [Bay of Pigs]	60.41% (House)	No	1	<b>Yes:</b> “. . . Kennedy used executive privilege to prevent legislative oversight of foreign policy” (Rozell 2010, 42).
Nixon (1970)	44.14% (House)	No	0	<b>Yes:</b> “The president approved an assertion of executive privilege by Attorney General John Mitchell to withhold the requested documents on the basis that it would not be in the public interest to release confidential FBI reports” (Rozell 2010, 60).
Nixon (1971)	44% (Senate)	No	1	<b>Yes:</b> “Neither Fulbright nor the other members of the committee raised this difference of opinion to the level of a constitutional dispute” (Rozell 2010, 60).
Nixon (1972)	44% (Senate)	No	2	<b>Somewhat:</b> “The White House and the committee eventually compromised on the issue, allowing Flanagan to provide limited testimony . . .” (Rozell 2010, 60).
Nixon (1973)— Senate Select Committee subpoena [Watergate 1]	42% (Senate)	Yes	3	<b>No:</b> “. . . the Court ruled that the need for information in this criminal case overruled the president’s claim to executive privilege” (Rozell 2010, 62).
Nixon (1973)— grand jury subpoena [Watergate 2]	N/A (Special Prosecutor Archibald Cox)	Yes	4	<b>No:</b> “. . . the Court ruled that the need for information in this criminal case overruled the president’s claim to executive privilege” (Rozell 2010, 62).
Nixon (1974) [Watergate 3]	N/A (Special Prosecutor Leon)	No	5	<b>No:</b> “. . . the Court ruled that the need for information in this criminal case overruled the president’s claim to executive privilege” (Rozell 2010, 62).

	Jaworski)			
Ford (1975)	33.10% (House)	No	0	<b>Somewhat:</b> “Eventually the administration and Congress reached a compromise whereby committee members and staff would attend an oral briefing on the information containing the disputed materials” (Rozell 2010, 82).
Carter (1980)	63.91% (House)	No	0	<b>No:</b> “The controversy was effectively ended on 13 May 1980 when a district court voided Carter’s proclamation . . .” (Rozell 2010, 92).
Reagan (1981)	44.14% (House)	Yes	0	<b>No:</b> “The administration decided to resolve the issues in Congress’s favor and . . . made the contested documents available to the subcommittee for review” (Rozell 2010, 101).
Reagan (1982)	44.14% (House)	No	1	<b>Somewhat:</b> “. . . in an effort to put the controversy to rest, the White House accepted a compromise to release the disputed documents” (Rozell 2010, 103).
Reagan (1986)	53% (Senate)	No	2	<b>Somewhat:</b> “The Justice Department and Judiciary Committee agreed on an arrangement in which certain documents would be reviewed by selected senators and staff members” (Rozell 2010, 104).
H. W. Bush (1991)	38.39% (House)	No	0	<b>Yes:</b> “the Conyers committee chose not to challenge Bush’s claim of executive privilege” (Rozell 2010, 116).
Clinton (1994)	N/A (Independent counsel Donald Smaltz)	No	0	<b>No:</b> “The court ultimately determined that the balance tipped in favor of the independent counsel’s need for information in a criminal investigation” (Rozell 2010, 130).
Clinton (1995)	48% (Senate)	No	1	<b>No:</b> “The White House ultimately produced the notes for the Senate Whitewater Committee and the OIC . . .” (Rozell 2010, 129).
Clinton (May 1996)	46.90% (House)	No	2	<b>No:</b> “The White House . . . agreed to an accommodation with the committee whereby all remaining documents would be made available to committee members and staff . . .” (Rozell 2010, 127).
Clinton (Sept. 1996)	46.90% (House)	No	3	<b>Yes:</b> “. . . Gillman and the committee ultimately did not pursue the matter and effectively allowed Clinton’s use of executive privilege to stand” (Rozell 2010, 137).

Clinton (Oct. 1996)	46.90% (House)	No	4	<b>Yes:</b> “The Zeliff subcommittee dropped the matter once Congress went into recess in October” (Rozell 2010, 135).
Clinton (May 1997)	47.59% (House)	Yes	5	<b>No:</b> “. . . the committee achieved full access to the documents” (Rozell 2010, 140).
Clinton (Oct. 1997)	47.59% (House)	Yes	6	<b>No:</b> “In early 1998, the committee held hearings on the controversy and used the disputed documents” (Rozell 2010, 134).
Clinton (1998)	N/A (Independent Counsel Kenneth Starr)	No	7	<b>No:</b> “Judge Johnson ultimately ruled against Clinton’s use of executive privilege in the Lewinsky investigation” (Rozell 2010, 144).
Clinton (1999)	48.51% (House)	No	8	<b>Yes:</b> “. . . without access to these documents currently, it is not possible to make a firm determination whether the president was concealing embarrassing information . . . or whether divulging legal advice on the pardons would have jeopardized the lives or safety of individuals who had provided information to the government . . .” (Rozell 2010, 146).
Bush (2001)	50.57% (House)	Yes	0	<b>Somewhat:</b> “On 1 March 2002, the two sides reached an accommodation in which the committee would be permitted to openly view six of the ten disputed documents” (Rozell 2010, 152).
Bush (2002)	N/A (FOIA request made by Judicial Watch Inc.)	No	1	<b>No:</b> “. . . the ruling was a clear defeat for President Bush” (Rozell 2010, 169).
Bush (2007)	46.92% (Both House and Senate)	No	2	<b>Somewhat:</b> “. . . the parties reached an agreement in March 2009. The executive provided some of the requested documents to the committee and Ms. Miers was permitted to testify, under oath, in a closed, but transcribed, hearing” (Garvey 2014, 26-7).
Bush (June 2008)	46.44% (House)	No	3	<b>Yes:</b> “In May 2009, the Obama administration effectively ended the Bush policy approach . . .” (Rozell 2010, 185).
Bush (July 10,	46.44%	No	4	<b>Somewhat:</b> “Mr. Rove was permitted to testify as

2008)	(House)			part of the accommodation reached between the executive and the House . . .” (Garvey 2014, 27).
Bush (July 16, 2008)	46.44% (House)	No	5	<b>Yes:</b> “. . . the Obama Justice Department decision to decide with the former Bush administration claim of executive privilege to prevent the release of the transcript of the Cheney interview . . .” (Rozell 2010, 191-2).
Obama (2012)	44.37% (House)	Yes	0	<b>No:</b> “President Barack Obama relented Friday, turning over to lawmakers thousands of pages of records. . . .” <sup>3</sup>

---

<sup>3</sup> Josh Gerstein, “Obama Relents in Fight Over Fast and Furious Documents,” *Politico*, 8 April, 2016.

## Appendix B: Table of Variables 4-5

Case	National Security	Contempt of Congress	Successful? (for reference with independent variables)
Kennedy (1962)	Yes	No	Yes
Kennedy (1962)	Yes	No	Yes
Nixon (1970)	No	No	Yes
Nixon (1971)	Yes	No	Yes
Nixon (1972)	No	No	Somewhat
Nixon (1973)— Senate Select Committee subpoena [Watergate 1]	No	Court	No
Nixon (1973)— grand jury subpoena [Watergate 2]	No	Court	No
Nixon (1974) [Watergate 3]	No	Court	No
Ford (1975)	Yes	<b>Yes:</b> “the committee cited Kissinger for contempt...” (Rozell 2010, 81).	Somewhat
Carter (1980)	No	<b>Yes:</b> “The subcommittee voted to hold Duncan in contempt of Congress” (Rozell 2010, 92).	No
Reagan (1981)	Yes	<b>Yes:</b> “....the Committee on Energy and Commerce passed a resolution recommending that Watt be cited by the full House for contempt of Congress” (Rozell 2010, 101).	No
Reagan (1982)	No	<b>Yes:</b> “On 16 December 1982, the House of Representatives voted 259-105 to find Gorsuch in contempt of Congress” (Rozell 2010, 102).	Somewhat
Reagan (1986)	No	No	Somewhat
H.W. Bush (1991)	No	No	Yes

Clinton (1994)	No	No	No
Clinton (1995)	No	No	No
Clinton (May 1996)	No	<b>Yes:</b> “The committee voted to hold Quinn and two former White House aides in contempt of Congress” (Rozell 2010, 126).	No
Clinton (Sept. 1996)	Yes	Court	Yes
Clinton (Oct. 1996)	No	No	Yes
Clinton (May 1997)	No	<b>Yes:</b> “Burton also called Ruff to testify before the committee on 15 May 1997 ‘to explain why you should not be held in contempt of Congress’” (Rozell 2010, 139).	No
Clinton (Oct. 1997)	No	No	No
Clinton (1998)	No	Court	No
Clinton (1999)	No	No	Yes
G. W. Bush (2001)	No	No	Somewhat
G. W. Bush (2002)	No	Court	No
G. W. Bush (2007)	No	<b>Yes:</b> “The House passed contempt resolutions against Miers and Bolton on February 14, 2008” (Garvey 2014, 26).	Somewhat
G. W. Bush (June 2008)	No	No	Yes
G. W. Bush (July 10, 2008)	No	<b>Yes:</b> “On July 30, 2008, the full Judiciary Committee approved a report recommending that Mr. Rove be cited for contempt by the House” (Garvey 2014, 27).	Somewhat
G. W. Bush (July 16, 2008)	Yes	<b>Yes:</b> “. . . the committee scheduled a meeting to consider a resolution citing him for contempt of Congress” (Garvey 2014, 27).	Yes
Obama (2012)	No	<b>Yes:</b> “. . . the committee voted to hold Attorney General Eric Holder . . . in contempt of Congress. The full House voted in favor of a criminal contempt citation on June 28, 2012” (Garvey 2014, 28).	No



## References

- Albert, Lee A. 1974. "Executive Privilege: A Constitutional Myth." *Columbia Law Review* 74: 1360-1370.
- Barrett, Andrew W., and Matthew Eshbaugh-Soha. 2007. "Presidential Success on the Substance of Legislation." *Political Research Quarterly* 60(1): 100-112.
- Beckmann, Matthew N. 2010. *Pushing the Agenda: Presidential Leadership in US Lawmaking, 1953-2004*. New York: Cambridge University Press.
- Berger, Raoul. 1965. "Executive Privilege v. Congressional Inquiry." *UCLA Law Review* 12: 1058-1060.
- . 1974. *Executive Privilege: A Constitutional Myth*. Cambridge: Harvard University Press.
- Bond, Jon R., and Richard Fleisher. 1990. *The President in the Legislative Arena*. Chicago: The University of Chicago Press.
- Canes-Wrone, Brandice. 2001. "The President's Legislative Influence from Public Appeals." *American Journal of Political Science* 45(2): 313-329.
- Canes-Wrone, Brandice, and Scott de Marchi. 2002. "Presidential Approval and Legislative Success." *The Journal of Politics* 64(2): 491-509.
- Catt, Gary R. 2013. "Measuring Legislative Success as the Distance Policy Moves." Ph.D. diss. University of Houston.
- Chafetz, Josh. 2009. "Executive Branch Contempt of Congress." *The University of Chicago Law Review*. 76(3): 1083-1156.
- Covington, Cary R., J. Mark Wrighton, and Rhonda Kinney. 1995. "A 'Presidency-Augmented' Model of Presidential Success on House Roll Call Votes." *American Journal of Political Science* 39(4): 1001-1024.
- Cox, Archibald. 1974. "Executive Privilege." *University of Pennsylvania Law Review* 122(6): 1383-1438.

- Cox, Gary W., and Matthew D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. New York: Cambridge University Press.
- Edwards, George C., III. 1985. "Measuring Presidential Success in Congress: Alternative Approaches." *The Journal of Politics* 47(2): 667-685.
- . 1989. *At the Margins: Presidential Leadership of Congress*. New Haven, CT: Yale University Press.
- Edwards, George C., III, Andrew Barrett, and Jeffrey Peake. 1997. "The Legislative Impact of Divided Government." *American Journal of Political Science* 41(2): 545-563.
- Eshbaugh-Soha, Matthew. 2010. "The Importance of Policy Scope to Presidential Success in Congress." *Presidential Studies Quarterly* 40(1):708-724.
- Eshbaugh-Soha, Matthew, and Jeffrey S. Peake. 2004. "Presidential Influence Over the Systemic Agenda." *Congress and the Presidency* 31(2): 181-201.
- Freedom of Information Act. 2006. *Statutes at Large*. Vol. 121.
- Garvey, Todd. 2014. *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*. (CRS Report No. 7-5700). Congressional Research Service.
- House.gov. 2017. "Party Divisions of the House of Representatives." <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (March 17, 2018).
- In Re SEALED CASE*. 1997. 121 F.3d 729 (D.C. Cir.).
- Lockerbie, Brad, Stephen Borrelli, and Scott Hedger. 1998. "An Integrative Approach to Modeling Presidential Success in Congress." *Political Research Quarterly* 51(1): 155-172.
- Martin v. Office of Special Counsel*. 1987. 819 F.2d 1185. (D.C. Cir.).
- McCarty, Nolan M. 1991. "Presidential Reputation and the Veto." *Economics and Politics* 9: 1-26.
- McCarty, Nolan M., and Keith T. Poole. 1995. "Veto Power and Legislation: An Empirical Analysis of Executive and Legislative Bargaining from 1961 to 1986." *Journal of Law, Economics, & Organization* 11(2): 282-312.
- Miroff, Bruce. 1989. "Secrecy and Spectacle: Reflections on the Dangers of the Presidency." In *The Presidency in American Politics*, eds. Paul Brace, Christine B. Harrington, and Gary King. New York: New York University Press.
- Ostrom, Charles W. Jr., and Dennis M. Simon. 1985. "Promise and Performance: A Dynamic Model of Presidential Popularity." *The American Political Science Review* 79(2): 334-58.

- Peterson, Todd David. 2011. "Contempt of Congress v. Executive Privilege." *Journal of Constitutional Law* 14(1): 77-159.
- Rivers, Douglas, and Nancy L. Rose. 1985. "Passing the President's Program: Public Opinion and Presidential Influence in Congress." *American Journal of Political Science* 29(2): 183-196.
- Rozell, Mark J. 2010. *Executive Privilege: Presidential Power, Secrecy, and Accountability*. 3<sup>rd</sup> ed. Lawrence: University Press of Kansas.
- Rudalevige, Andrew. 2002. *Managing the President's Program: Presidential Leadership and Legislative Policy Formulation*. Princeton, NJ: Princeton University Press.
- Senate.gov. 2017. "Party Division." <https://www.senate.gov/history/partydiv.htm> (March 17, 2018).
- United States v. Nixon*. 1974. 418 U.S. 683.
- United States v. Reynolds*. 1953. 345 U.S. 1.
- U.S. Congress. House. 1843. 27<sup>th</sup> Cong., 3rd sess., H Rept. 271.
- U.S. Congress. Senate. Subcommittee on Separation of Powers of the Committee on the Judiciary. 1971. *Statement Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*. 92<sup>nd</sup> Cong., 1<sup>st</sup> sess., July.
- U.S. Department of Justice. 2014. *Department of Justice Guide to the Freedom of Information Act*. Washington, D.C.: Department of Justice.
- Wise, David. 1973. *The Politics of Lying: Government Deception, Secrecy, and Power*. New York: Random House.
- Zemel v. Rusk*. 1965. 381 U.S. 1.